No. 4481

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

FRANK C. BERTELMANN,
Appellant,

vs.

MARY N. LUCAS et al.,
Appellees.

BRIEF FOR KILAUEA SUGAR PLANTATION COMPANY

Upon Appeal from the Supreme Court of the Territory of Hawaii.

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I. QUESTIONS INVOLVED; SCOPE OF THIS BRIEF.

The grounds of the seven demurrers include not only the fundamental questions (involving the construction of the will) of whether the appellant, if he ever had the right to perform, had not lost it by reason of having parted with his interest in the land and whether, if he had the right to perform and had not lost it, he did not fail in his attempt to perform by reason of having made

the tenders to the wrong persons, that is, to the grantees and heirs of the daughters and shortcoming sons instead of to the daughters and shortcoming sons themselves, but also such grounds as multifariousness, misjoinder, adequacy of remedy at law, lack of prior determination of questions at law, pendency of another action, laches, etc., etc. The Circuit Judge sustained all the demurrers upon all grounds. The Supreme Court sustained the demurrers upon two of these grounds, namely multifariousness and adequacy of remedy at law, and expressed no opinion upon the others. We commend to the attention of this Court the opinion of the Supreme Court for an excellent summary (Tr., pp. 134-144) of the lengthy amended bill and for a review (pp. 144-171) of the law as applicable to this case upon the two questions covered by the opinion. This respondent's demurrer (Tr., p. 101) sets forth twelve grounds, but this brief will be devoted mainly to the two fundamental grounds just referred to, inasmuch as two of the other grounds are covered so fully and effectually in the opinion of the Supreme Court and all of the other grounds will probably be fully covered by the briefs of other appellees, particularly Mrs. Lucas and the Scott children, whose lessee this respondent is as to 8/9 of the land under Mrs. Lucas and as to 1/9 under the Scott children, at a total rental of $8000 a year (Tr., pp. 27, 85). These three (this appellee, Mrs. Lucas and the Scott children) form a group with similar interests as the parties in possession claiming legal title.

The petitioner has devoted much of his brief to these two fundamental grounds and expressed the wish that the court might decide them in order that he might know once

for all if he has no right to the property rather than that the case should be decided on other points which might necessitate further litigation,—perhaps only to find out at last that he is not entitled to the property. We join in the desire for a decision on one or both of these grounds if such decision is against the appellant; for a decision on either, if adverse to the appellant, would settle the entire case and not only render it unnecessary to decide any of the numerous other questions raised by the demurrers but avoid further litigation, while a decision on both as well as on the numerous other questions and much further litigation would be necessary in order to decide the case finally for the appellant. See appellant's brief, pp. 19, 131.

These two questions are whether under the provisions of the will the appellant could and, if he could, whether he did perform the prescribed condition so as to entitle him to relief under any circumstances against any of the parties, or at least against the group to which this appellee belongs, in any form of action or suit, whether at law or in equity.

So far as necessary for the purposes of these grounds a brief statement of the existing status as to the facts involved in the construction of the will and the construction thus far made of the will in former decisions follows:

II. PRESENT STATUS AS TO FACTS AND FORMER DECISIONS.

The testator, Christian Bertelmann, died in 1895 (Tr. p. 4) leaving a widow, three sons and six daughters, for whom he made provision by the will (Tr. p. 70) in question. By item First he disposed of the rental, $6000.00 a

year, of the land in question under a lease to expire November 1, 1915, one-third to the widow and two-thirds equally among the children. By item Second he divided a small tract of land into ten lots and gave one to the widow on condition that she should not dispose of it outside of the family and expressed a wish, not mandatory, that if she should dispose of it (that is, within the family) she should give a preference to the eldest son, provided she had no special reason for preferring any of the other children, and gave the remaining nine lots to the several children with a direction that they should not be disposed of outside of the family as long as there should be offspring of the family. By items Third and Fourth, besides making provision for the wife for life, he gave the land in question equally to all of the children with a provision that a performing son or sons might by payment, in the year following the lease, of $5000.00 to each of the daughters and non-performing sons, if any, have the whole land, but that, if they should not perform, the land should be sold and the proceeds divided equally among all the children or their lawful heirs and assigns.

The widow died in 1915 (Tr. p. 24). One daughter, Catherine, who became Mrs. Scott, died before the expiration of the lease (Tr. p. 13) leaving three children as her heirs, one of whom has died since. The other five daughters and two of the sons sold their interests to Mrs. Lucas (Tr. p. 11) and the interest of the remaining son, the appellant, was sold to her on execution (Tr. p. 16)—all before the expiration of the lease. The appellant claims that the execution sale was void (Tr. p. 17) and that he is a performing son by reason, as he says, of having tendered

$35,000 to Mrs. Lucas (Tr. p. 11) and $5000 to the guardian of the Scott children (Tr. p. 13) on the last two days of the year after the lease. In order to get the money he agreed to convey and shortly afterwards purported to convey 6/9 of the land to Aluli, Lane and McCandless.

The construction of the will has been the subject of three decisions.

The first of these, Bertelmann v. Kahilina, 14 Haw. 378, was a submission to the Supreme Court of Hawaii upon agreed facts in 1902 and was between the appellant and one other son as plaintiffs, and the widow and four of the daughters with their husbands as defendants. The question was, what interests did the widow, the sons and the daughters take under the will. A summary of the conclusions of the Court is set forth on page 384. In brief, subject to the widow's interest, now terminated, the Court, one member dissenting, held that all the children took present vested estates in fee simple, that is, one-ninth each,—the interests of the daughters and also of the shortcoming sons, if any, being defeasible in favor of the performing son or sons, if any, upon the performance of a condition, that is, the payment of $5000 to each of the others by the performing son or sons. All took defeasible vested estates in fee simple, and the performing son or sons, if any, would take by way of contingent executory devise such estates as might be defeated by performance of the condition. The condition would be a condition subsequent for the purpose of defeating the interests of the daughters and shortcoming sons, and a condition precedent for the purpose of vesting those interests in the per-

forming sons. This construction of the will was followed by the same Court of different personnel in the later case of Scott v. Lucas, 23 Haw. 338, and on appeal in the latter case by this Court in 239 Fed. 450. These three decisions must be regarded as settling beyond controversy the construction of the will as to what estates were taken by the sons and daughters under the will and the shiftability of the interests of some of the children to the others upon the performance of the condition—and such is the appellant's concession and contention (Tr. p. 8; Brief, p. 67).

The second case, Scott v. Lucas, 23 Haw. 338, was also a submission to the Supreme Court of Hawaii upon agreed facts, in 1916, the year following the expiration of the lease. Meanwhile Mrs. Mary N. Lucas had acquired the interests of the two sons other than the appellant and of the five daughters other than Catherine, by voluntary conveyances and, besides holding a mortgage of appellant's interest, claimed to have acquired his equity of redemption, that is, all his interest by purchase upon the execution sale above mentioned. She claimed the right, as owner of eight-ninths, to acquire the remaining one-ninth by paying $5,000 to Catherine's heirs, her three minor children, whose guardian was the Bishop Trust Co., Ltd. The case was between these minors and their guardian as plaintiffs and Mrs. Lucas as defendant and was brought for the purpose of determining whether Mrs. Lucas could thus acquire the interest of the minors. Two questions were involved and considered by the court. One was whether the right or privilege of performing the condition and thus acquiring the other interests was personal to the sons or could be transferred by them to another person,

namely, Mrs. Lucas; the other was whether the liability of any daughter or shortcoming son to have his or her interest defeated or divested by performance of the condition was personal to such daughter or son or could pass from him or her to his or her successor in interest. In other words, on the one hand, could the right or privilege of performing the condition and thus acquiring the other interests be exercised by Mrs. Lucas as assignee of the sons; and, on the other hand, even if she could exercise such right or privilege as against Catherine, in case Catherine were still living, could she exercise such right or privilege as against Catherine's heirs after her death. The court based its decision on the second of these questions and held that, inasmuch as an estate could not be defeated by the performance of a condition subsequent unless the condition were performed strictly and fully and inasmuch as the condition in question could be performed strictly and fully only by paying the $5000 to Catherine herself, it could not be performed strictly and fully at all by reason of her death; in other words, that payment of the $5000 to others, namely her children, even though they were her heirs and successors in interest, would not be strict and full performance. The court intimated strongly also—on the first of these questions—that the right or privilege of performing was likewise personal and that Mrs. Lucas could not as the assignee of the sons perform the condition precedent to acquiring the interest of Catherine or her minor children but stated that it was unnecessary to decide this point definitely. One member of the Court, the Chief Justice, now attorney for Mrs. Lucas, dissented on both of these points, but not only must the

majority view be considered as determining the law to the same extent as if the decision had been unanimous, but this Court sustained the majority, basing its decision however on the first of these questions and saying that it was unnecessary to decide the second.

In that case on appeal in 239 Fed. 450, this Court, besides holding that payment of the $5,000 was a condition, held that the right or privilege of performing the condition was personal to the sons and could not be transferred to Mrs. Lucas, their successor in interest. The Court took the view that for the purpose of acquiring the other interests the condition was a condition precedent and that the condition precedent in order to operate would have to be fully and literally performed—just as the same condition as a condition subsequent for the purpose of defeating the other interests would have to be fully and literally performed, as held by this Court and by the Hawaiian Supreme Court. See pages 456-457.

III. APPELLANT DID NOT PERFORM THE CONDITION BECAUSE HE MADE THE TENDERS, IF AT ALL, TO THE WRONG PERSONS.

The first to be considered of the two fundamental questions stressed in this brief is whether the allegations of the bill show that the appellant performed the condition, assuming that he had the right to do so. If, as we contend, he did not perform, he is out of court at the start. This question is raised in general by Par. I and in particular by Par. IV of this appellee's demurrer (Tr. p. 102).

Under this question we do not propose to discuss secondary matters or matters of detail, as, for instance, whether the bill shows that the tender of $35,000, if made, was made at the right time or whether it could be made to Mr. Lucas instead of to Mrs. Lucas or at her premises in her absence, etc., or as to whether the tender of $5,000 could be made to the guardian instead of to the Scott children themselves.

Whatever the details may be as to when or how he attempted to make the tenders to certain persons directly or indirectly through their alleged representatives, the bill shows that the appellant did not make or attempt to make any tenders to the other sons or to the daughters themselves but intended to make tenders, if at all, only to Mrs. Lucas and the Scott children, directly or indirectly, that is, to the successors in interest of the other sons and the daughters in the land.

Our contention is that the condition could be performed strictly and literally, as required, only by making the tenders to the other sons and the daughters, at least to those who were living, and that tenders to other persons, particularly to Mrs. Lucas, cannot be held to be performance of the condition.

Appellant himself seemed to realize the embarrassment of his position in this respect, for (Tr. p. 37) he charged Aluli, through whom he claims to have made the tender, with having neglected to make it in such manner as he should have known how to make it and in such manner as it could have been made by a lawyer competent to handle such a matter and particularly by reason of not having deposited the money in court with a petition asking the

court to decide to whom it should be paid, and (Tr. p. 43) he charged Aluli, Lane and McCandless with endeavoring to make him believe that a mistake had been made in tendering the money to Mrs. Lucas instead of to the other sons and the daughters.

The basis advanced by him for his contention that the tender was properly made to the successors in interest of the daughters and other sons is that performance was a purchase of the other interests in the land and hence that the tenders had to be made to those who then had the other interests, namely, Mrs. Lucas and the Scott children. (See, e. g., his brief, pp. 80, 85, 92, 101.) There is, however, we submit, no such basis. The transaction was not one of purchase and sale but was one of performance of a condition—although such expressions as "buy out" "bought out," etc., have been used more or less by attorneys and courts as a matter of convenience. This court even went so far in one place (239 Fed. at 457) as to refer to a conveyance—of course not meaning to decide that a conveyance would be necessary. The Supreme Court of Hawaii, in 14 Haw. 378 at 383, referred to the use of the word "buy" in one place in the will as bearing on the question of what estates were given, not as showing that a purchase and sale was intended; that word was used as meaning "buy" only "in a certain sense." The decisions as to defeasible vested fees, executory devises, conditions precedent and subsequent, strict and literal performance, etc., show that none of the courts considered it a case of purchase and sale.

There was no agreement or contract of purchase and sale between a would-be performing son and the short-

coming sons or the daughters or the latter's heirs or assigns. There was no privity between them, much less between a would-be performing son and Mrs. Lucas. There were no negotiations for a purchase and sale. The short-coming sons and the daughters and Mrs. Lucas had and could have nothing to say or do about the amount to be paid or whether it should be paid at all or when or what the effect of payment would be. The performance of the condition by payment of the $5,000 to each of the right persons would effect a defeasance of the other interests and vest them in the performing son or sons, whether the others so desired or not. This would be by force of the will as made by the testator, who, of course, could not make contracts for others. As held by the Supreme Court in the first case (14 Haw. 378), followed in the later cases, and asserted by the appellant in his bill (Tr. pp. 8, 9, 10, 15-16) the sons by performing the condition would take the interests of the others by way of executory devise, that is, under the will and not under any arrangement between the children. Indeed the appellant claims that by reason of the alleged tenders he became vested with the "whole estate" in the land. No conveyance was required. No suit for specific performance of a contract or agreement to make a sale or conveyance could be maintained, for there was no such contract or agreement. Moreover, the performance of the condition by the payment of the $5,000 to each of the others was to effect the transfer irrespective of how valuable the several interests might be. No doubt the testator desired to be fair as between his children and when he made his will in 1891 $5,000 may have been a fair valuation of each ninth interest, but if the appellant's

allegations (Tr. p. 34) as to the value of the land are true or even 20% true the value of each interest at the time of the tenders was far more than $5,000. It was the performance of the condition that was to effect a transfer, that is, a divesting from some and a vesting in others. It would be precisely the same if the condition were of any other kind. Instead of a payment to each of the others, it might have been a payment of the testator's debts to his creditors, or it might have been a payment to certain charitable institutions, or it might have been the performance of some other act than the payment of money, as, for instance, going through college, or getting married, &c.

Suppose the other sons or the daughters or Mrs. Lucas had made a conveyance to someone else who had not yet put the conveyance on record and suppose appellant knew nothing about it, whether it was on record or not, it would be impossible for him to perform the condition if he had to perform it by making the tenders to those who held the interests at the time. Or suppose the other sons or the daughters or Mrs. Lucas had conveyed part of their interests to one person and part to another or parts to many different persons, then if the tenders had to be made to those who at the time held the interests, how would appellant be able to make them? Or suppose there was a question as to who the heirs of a deceased son or daughter were? How could he know how much to tender to one and how much to another? Suppose the Scott children were of age, should he have tendered 1/3 of $5,000 to each of them? Suppose they were under age and had no guardian? Again, if the tenders had to be made to those who held the interests at the time and not to the

shortcoming sons and daughters, then since this appellee, the Kilauea Sugar Plantation Company, had an interest in the property, namely, a lease from Mrs. Lucas for a considerable time yet to come, a proper proportion of the money should have been tendered to it but no such tender was made to it. Or suppose one of the sons or daughters had conveyed a life interest to A with remainder in fee to B?

This is the view (namely, that the tender if properly made would effect a transfer as a performance of a condition and not as a purchase and sale) taken by the petitioner and his then co-plaintiffs, Aluli, Lane and McCandless, when they brought the action of ejectment on the theory that the legal title had passed to them by performance of the condition and this is the claim of the petitioner in the present suit. If he should wish something of record to show his alleged title he could not compel a conveyance from Mrs. Lucas, nor could he compel one from the shortcoming sons and the daughters if the tenders had been made to them, but he would have to look to a judgment of court, as, for instance, in an action of ejectment or in a statutory action to quiet title, or a decree of the Land Court. Perhaps he could obtain a decree in equity if he were in possession. He claims now also that, though out of possession, he could obtain a decree in equity settling the title but we need not stop to consider that at this point. If he could obtain such a decree, it would be a decree settling the title by its findings—not a decree for specific performance, &c.

Since the interests of the shortcoming sons and the daughters were defeasible (though vested) fee simple in-

terests, any purchaser, as, for instance, Mrs. Lucas, would take them as defeasible estates, that is, would take the interests subject to their being defeated by performance of the condition. Mrs. Lucas took the risk, just as anyone who might purchase a defeasible estate would take subject to the conditions imposed upon it. This is the view taken by the appellant. (Tr. pp. 8, 9; Brief, p. 40.)

Being a condition, the payment of the $5,000 to each of the shortcoming sons and daughters would have to be strictly, literally and fully performed, as held by the Supreme Court of Hawaii and this Court. It was because of this that the Supreme Court held that the tenders could not be made to the Scott children but as to them would have to be made, if at all, to their mother, Catherine, and that since it could not be made to her on account of her death it could not be made at all as to that ninth. This also is why this Court held that Mrs. Lucas could not make the tender even to Catherine if she had been alive. In other words, the tender had to be made by one or more of the sons and by no one else, and it had to be made to the other sons and the daughters and to one one else.

The appellant alleged (Tr. p. 11) that the other sons and the surviving daughters had sold to Mrs. Lucas their several rights to be paid the amounts which would soon have been due to be paid to them,—but this is obviously a mere conclusion—the appellant's inference that a conveyance by a shortcoming son or daughter of his or her ninth interest to Mrs. Lucas would carry with it the right to be paid the $5000, and this is the view taken by the appellant in his brief at p. 89. As to Catherine there had not even been a conveyance to her children. Moreover, it is not

true that these amounts were soon to become due. There was no obligation on the part of any son to make the payments. It was purely optional and there was no right on the part of any shortcoming son or any daughter to enforce any payment. No such payment could be enforced by any of them by a suit or action at law or in equity. In the case of Scott v. Lucas in the Supreme Court and in this Court it appears that the other sons and the surviving daughters had sold their interests to Mrs. Lucas and further (239 Fed. 456) that the other sons (not the daughters) had purported to convey to Mrs. Lucas not only their interests in the lands but also the rights, powers and privileges granted under paragraph THIRD of the will, that is, to perform the condition and so acquire the title, and yet, notwithstanding this sweeping attempt to transfer to Mrs. Lucas the right to make the tender and thus to acquire any outstanding interests, the court held that the right did not pass because it could not pass, whatever agreement might be made between the sons and Mrs. Lucas. If the right to make the tenders which actually existed in the sons could not be transferred, certainly the alleged right to be paid $5,000 each which did not exist in the sons could not be transferred. Moreover, their deeds did not even purport to transfer any moneys or the right to any moneys that might be paid to them by a performing son.

Each shortcoming son and each daughter might have entered into a valid agreement with Mrs. Lucas to the effect that if the $5,000 should be paid to him or her he or she would pay it over to Mrs. Lucas. That would be a contract to do something in the future upon a contingency,

but not only does it not appear that any such contract was made but no such contract could be binding on or taken advantage of by a performing son. There was no novation of parties, even if there could have been a novation, for a novation would require the assent of all three parties, namely, the performing son, the shortcoming sons and Mrs. Lucas. Of course there could be no novation of contract because there was no contract between a performing son and a shortcoming son or any contract of the kind in question between the shortcoming sons and Mrs. Lucas, and besides no agreement whatever between a shortcoming son and Mrs. Lucas could change the will of the testator or the nature or terms of the condition imposed by the testator, which was that the payment should be made by a son or sons, as held by the Supreme Court and this Court, to a son or sons and daughters, as held by the Supreme Court, and no shortcoming son and third party could change the terms of that condition, and much less could a would-be performing son change the condition without the concurrence of the shortcoming sons and Mrs. Lucas. If the would-be performing son did not care to take the risk of making the tenders to the shortcoming sons and the daughters for fear that they would take the money, or if for any other reason he failed to perform the condition by making the tenders to them he has only himself to blame, and Mrs. Lucas is entitled to keep the interests for which she paid good money and as to which she took her risk and fortunately for her came out successfully.

Appellant cites four state cases on pages 95-7 of his brief, all of which, we submit, fortify our contentions.

They are Johnson v. Johnson, 81 Pa. 257 (wrong citation for 32 P. F. Smith 257); Bayer v. Walsh, 30 Atl. 1039 (166 Pa. St. 38); Schrader v. Schrader, 139 N. W. 160 (158 Ia. 85); Jacobs v. Ditz, 102 N. E. 1077 (260 Ill. 98). These support our contention that tender or payment is a condition, performance of which would divest the estate in some and vest it in others, and that the theory of a purchase and sale or the necessity of a conveyance is not sustainable, although the wording in some of these cases was more favorable to that theory than is the wording now under consideration. In the Iowa case, it is true, the court, by a 3 to 2 decision, held that tender or payment was a charge and condition subsequent, not precedent, but under language quite different from that now in question. To avail himself of that case, appellant would have to maintain that he obtained directly by the will at the outset a vested estate in the interests of the shortcoming sons and daughters subject only to a charge to pay $5000 to each of them, nonpayment to operate as non-performance of a condition subsequent to defeat his estate—contrary to the decisions already made construing this will.

The shortcoming sons conveyed to Mrs. Lucas merely their defeasible original ninth interests in the land, which she took subject to the chance that they might be defeated. They did not transfer or relinquish their right to the $5000 in case it should be paid. If they had they naturally would have asked a higher price of her.

On this question as to whether the tenders should have been made to the brothers and sisters or to Mrs. Lucas, the appellant, besides advancing the theory of "purchase

and sale," discussed above, advances also the theory of "option." See his brief, pp. 84, 103-4. He says, "A gave B an option on his land, and then sold it to C, who had knowledge of B's option; B tendered payment to A in performance of the conditions of his option and his tender was held good, because C had knowledge of B's rights when he acquired title," and in support of this he cites Frank v. Stratford-Handcock, 77 Pac. 134 (13 Wyo. 37). This is sound law but has no application to the present case. In that case the tender was made to the vendor while in the present case it was made to the vendee,—the vendor in that case corresponding, so far as he corresponded at all, with the shortcoming sons and the daughters in this case, and the vendee corresponding with Mrs. Lucas. In other words, the tender was made in that case just as we contend it should have been made but was not made in the present case. In that case also there was a contract between the vendor and the person who made the tender for the purchase of the land, that is, there was a contract between the parties corresponding in the present case to the shortcoming sons and the daughters on the one hand and the appellant on the other hand—which is not the case here. In that case also the covenant to convey was a covenant in a lease and ran with the land. In such cases of course the vendee is bound if he is not an innocent purchaser for value. The theory upon which he can be held is that after the vendor has given a binding option he in law holds the title as trustee for the person to whom the option was given, and if he sells to another who has notice of the option, such other likewise holds as trustee for the person to whom the option was given,

who is regarded as holding the equitable title or right. Hence if the person having the option performs he may hold both the vendor and the vendee although in different ways. Ordinarily the question would arise in a suit for specific performance, and since the vendee has and the vendor has not the legal title the vendee is the one who is ordered to make the conveyance, but even then it does not follow either that the tender should be made to him or if made to him alone that it would be sufficient, or in any event that he is entitled to any or all of the purchase price payable by the one who holds the option. How much of the purchase price he would be entitled to would depend upon the circumstances and particularly upon whether that amount was greater or less than the amount which he paid to the vendor—as held in the Frank case above cited.

Appellant further says on the same page (84) of his brief that, "It is well settled that one who sells land on which another holds an option, sells to his vendee the right to collect from the holder of the option, and payment to the owner's vendee is payment to the owner," and cites a number of cases in support of that statement, but an examination of the cases will show that he cited the wrong list of cases, if he had a list in support of that statement, for the cases cited relate to other subjects. We need not reiterate what we have already said to show that there is no analogy between this case and the ordinary case of an option created by contract.

There is nothing magic in the word "option." Indeed, that word is not even used in the will. Appellant seems to think that, if the law is as he states it with reference to an

option created by contract between the parties, it must be so in the present case because a son has an option to perform or not as he pleases. An option is merely a power or a right to make a choice to do or not do something, but it makes a great difference, so far as legal rights are concerned, how the option arises or what its nature is. If a piece of land is offered at auction I have the option of bidding and, by bidding high enough, of buying, but no legal rights arise from the fact that I have such an option. That kind of option is not what is meant when we speak of option with reference to legal rights. Similarly the option in the present case is not in the same category with options created by contract, although it is not an option that exists per se like the option just referred to. It is, however, an option or power conferred, not by the other party but by a third party, not by contract but by will, and, if exercised, the shifting of the title is not by conveyance or any act on the part of the previous holder but by force of the will. The performance is simply the performance of a condition named in the will.

If appellant's analogy is good so that tender could be made to Mrs. Lucas instead of to the other sons and the daughters, as in cases of options created by contract between the parties in which, at least under some circumstances, the right to receive the money and the duty to convey passes from the vendor to his assigns, then equally the analogy should hold in the reverse case, that is, the right to pay and to obtain title should pass from the other party to his assigns, and yet this Court has held with reference to this very will that the right to perform and obtain title did not pass from the shortcoming sons and

the daughters to Mrs. Lucas. Indeed, even on appellant's own suggested analogy (on the question of the right to the money and duty to convey passing from one who gave an option to one succeeding to his interest) the Supreme Court of Hawaii has likewise held that the right to the money and liability to lose the property did not pass from Catherine to her children. Appellant's counsel ignores the latter decision altogether.

We submit further that, aside from the conclusiveness of the foregoing reasoning, some deference should be given to the decision of the Supreme Court of Hawaii in Scott v. Lucas, 23 Haw. 338, as stare decisis, (not res judicata) in holding that the appellant, even if he had a right to perform the condition at all, could not perform it by making payment or tender to Mrs. Lucas. The court held that even if Mrs. Lucas had the right to perform the condition she could not do so by making payment or tender to the Scott children or their guardian, because the liability to lose an interest by divesting could not pass from a shortcoming son or a daughter to another. It held that, even if Mrs. Lucas could properly make payment or tender to Catherine in case Catherine were alive, she could not make it to Catherine's children after her death—although they were her successors in interest and inherited all rights of hers that could possibly pass from her to her children. How much more then, if possible, would it follow that payment or tender could not be made to Mrs. Lucas as the assignee or grantee of the shortcoming sons and the other daughters, and that, too, when she was an assignee of merely their interests in the land! In her

case she was a successor in interest by mere voluntary conveyance and her grantors were still in existence to whom payment or tender could be made, while in Catherine's case her rights went by law to her children and she was no longer in existence, so that payment and tender could not be made to her. The Circuit Judge was of course bound by that decision of the Supreme Court until the Supreme Court itself or a higher court should change the decision. But even the Supreme Court itself is bound by that decision as stare decisis to the same extent that it would be bound by any other decision as stare decisis, that is, to say, it could not take the position that the question had not been decided. The most that it could do would be to hold that the question had been decided but that like any other decision on any other point the Court might reverse its own former decision, which, of course, it does not do except in rare instances. This Court, of course, would not be absolutely bound by that decision because this is a higher court but until the Supreme Court or this Court reverses that decision it is stare decisis as to the Supreme Court, subject only to be reversed by the Supreme Court and not treated by it as an open question, and was absolutely binding upon the Circuit Judge. Mayor, &c. v. East Jersey Water Co., 70 Atl. (N. J.) 472, 488. The only way in which the appellant could try to get by the doctrine of stare decisis would be to contend that, because this Court decided the case on a different point, the point on which the Supreme Court decided it did not become stare decisis, but that argument would not hold. In the New Jersey case just cited

the State court decided on one point and the Federal Supreme Court on a different point and it was then contended that the point on which the State court decided was left open and was not stare decisis but the court held otherwise.

We contend further that since the condition could not be performed as to Catherine's ninth (because it could not be performed by payment or tender to her children) it could not be performed strictly, literally and fully at all. In other words, even if it could be performed as to the interests of the other two sons and the five surviving daughters by making tender or payment to Mrs. Lucas it still could not be performed as to Catherine's interest by making tender or payment to her children or their guardian and hence could not be performed at all because it had to be performed as to all or none.

IV. APPELLANT COULD NOT PERFORM THE CONDITION—BECAUSE, BY THE CONVEYANCE OF HIS INTEREST, HE HAD LOST THE RIGHT TO PERFORM.

The other of the two fundamental questions referred to above is whether the appellant at the time he claims to have made the tenders had the right to perform the condition or had then lost the right. Our contention is that he had lost the right. This question is raised in general by Par. I and in particular by Par. III of this appellee's demurrer (Tr. p. 102).

Appellant had lost his interest in the property and

hence was in no position to perform the condition and acquire the other interests because the will contemplated that the performing son or sons should have all interests or none and especially that they should keep their own original interests.

That this was the intention is shown by the reasoning of this Court in 239 Fed. at page 456. As the Court said, it was strictly a family scheme and the testator's idea was not that the sons should be favored as against the daughters in the distribution of the property but that the title of the land, subject to performance of the condition, should be kept in the male members of the family. Incidentally the testator probably had, as said by the Court, for one of his purposes the encouragement of his sons to practice habits of industry and thrift and to accumulate the moneys required for performing the condition when the appointed time should come. The idea was that the male members should get and keep all the property. This also, as the Court said, was in harmony with the previous provision of the will in which after having devised to each child a small piece of land the testator directed that no one of the pieces so devised should ever be conveyed or sold or in any other way disposed of outside of his family so long as there should be one or more legal offsprings of his family. But not only the appellant but the other two sons, so far from economizing and saving and practicing thrift so as to be in a position to perform the condition, squandered what they had and at the outset sold out the interests that were given to them.

Suppose all three of the sons had combined to make the payments or tenders, there would then be this absurd situation (if the sons could perform notwithstanding that they had parted with their original interests) that the three sons had conveyed away or lost their original three-ninths and had by making tenders to the daughters or their respective heirs or assigns acquired the other six-ninths and so would have the six-ninths originally given to the daughters but not the three-ninths originally given to themselves and so would have failed to carry out the intention of the testator as expressed in the will wherein he expressed his sincere wish and will that his land should befall in equal shares and interests upon his three sons and wherein he provided, in case of one or two shortcoming sons, that the other one or two sons should have a right to acquire the whole of his land and wherein he provided that upon performance his performing son or sons would enter in full possession of all his land and that his or their right and title would be undisputable. Or, would appellant contend that the three sons should make tenders or payment also to their own assignees, and so recover from them at $5000 each however much they may have sold to them for! It would seem to be clear that the appellant could not perform the condition and acquire the other interests unless he still had his own interest. The only question is whether he still had that.

In the first place, his original ninth was conveyed to Mrs. Lucas as the purchaser upon an execution in February, 1903, as set forth in Par. XIII of the bill

(Tr. p. 81; see also Brief p. 6). The appellant had already mortgaged his interest to Mrs. Lucas for $9,845, as set forth in Par. XIV, and what was sold upon execution was his equity of redemption, that is, his interest subject to the mortgage. He claims in the bill that that sale was void on several grounds.

For instance, he claims (Tr. p. 81; Brief, pp. 6, 110) that his right or interest in the nature of a contingent executory devise was not subject to sale because it was personal and non-assignable. He, however, gives no reason why his original ninth interest was not saleable and assignable. That was given to him outright as a present vested estate in fee simple and, although it was subject to be divested by his becoming shortcoming and by performance by one or both of the other sons, not only did the other sons fail to perform but, even if they had performed, his original ninth interest could have been previously sold or assigned subject to be divested. That was a present vested interest and not even an executory devise. Apparently the appellant had in mind the contingent executory devise which he might acquire by performance of the condition, in the other interests, that is, those of the shortcoming sons and the daughters, but those are not the interests in question. He had parted with his own ninth interest which undoubtedly was assignable. He contends that the original ninth interests of the other sons were assignable and it is upon that contention that he claims to have made the tender to Mrs. Lucas—because she had acquired those interests. If their interests were assignable, his was.

Again, he claims that the price paid on the execution sale was so grossly inadequate as to render the execution sale void on account of fraud, alleging that the value of the rights sold was more than $50,000 and the price only $50.00. If the price were so inadequate and if there were fraud, the sale at most would be voidable and not void, but obviously it is not voidable; for, aside from the fact that mere inadequacy alone apart from other things is not sufficient to make out a case of fraud, the doctrine of inadequacy of consideration has no application to an execution sale. That was not the case of a sale by agreement between the parties, in the negotiation of which one party might have committed fraud on the other. At such a sale the purchaser was merely one who was present at the auction and bid on the property. Mrs. Lucas was not even the plaintiff in the case in which the execution issued. It does not appear in the bill what the suit was or in what Court and if appellant desired to connect Mrs. Lucas up with any fraud in connection with the case it was incumbent on him to make the necessary allegations, which of course he could not do. It does appear by the bill that the interest which was sold was subject to a mortgage for nearly $10,000 and that the property was leased for a long term at $6,000 a year, which would seem to indicate that the value of the entire property (all interests) figuring on an eight year rental basis, which was then the usual basis for taxation (Chilton v. Shaw, 13 Haw. 250, 252), was only about $48,000 at that time. Even if it were double that value, one-ninth of it would be only about the amount of the

outstanding mortgage, to which the ninth that was sold was subject. Also a third of the rent was to go to the widow for life, leaving only $4,000 for the nine children. Under the circumstances, who would give more than $50 for the equity of redemption and especially when the purchaser would take the ninth interest subject to being divested by the performance of the condition, when the time should come, by one or both of the other sons?

Even if a case of fraud might have been made out and taken advantage of if the appellant had acted vigilantly he of course can not take advantage of it after sleeping on his rights for nineteen and a half years (to the time this suit was begun) with full knowledge of the facts. He fails to adduce any excuse for waiting so long a time. Vigilantibus non dormientibus aequitas subvenit.

He further claims that the execution sale was void for want of notice,—stating that the judgment in the case was rendered and that the sale was made while he was absent from the Territory. It is immaterial whether he was absent from the Territory or not when the judgment was rendered or when the sale was made, so long as he was served with summons in the case. If he chose to make default he is in no position to complain. When the case was brought against him and service was made on him he should have remained in the Territory and defended the case or have engaged some one else to look after it and if judgment went against him he should have paid it instead of allowing execution to issue against his property. It is true that

he says he was without any notice thereof, that is, of the judgment and sale, but no notice thereof was necessary. Notice of the suit by due service of summons was all that was necessary. Of course the sale was duly advertised. He states also that he was without such service of summons to answer demand as is required by due process of law, but that is a mere conclusion of law and not an allegation of fact. He takes care to avoid saying that service of the complaint and summons issued in the case was not made upon him. Of course if no service of the complaint or summons was made on him the execution sale would be void, and there would be no occasion for him to come into a court of equity to seek to have it set aside. He would have an adequate remedy at law.

Further, the sale occurred in February, 1903, or nineteen and a half years ago, and ever since that Mrs. Lucas has been holding under her deed under color of title and claim of right adversely to the petitioner and hence, whether the sale might have been set aside or not at that time, she has now acquired title by adverse possession, the Hawaiian period of limitations being, since 1898, ten years in the case of land. Rev. Laws, 1925, Sec. 2657; Hilo v. Liliuokalani, 15 Haw. 507, 508. Even if the execution sale were void, it would serve as a basis for adverse possession. Lopez v. Kaiaikawaha, 9 Haw. 27, 31; Waianae Co. v. Kaiwilei, 24 Haw. 1, 7. The bill shows that Mrs. Lucas is asserting title under the execution conveyance—leasing the property, collecting the rents, &c.—and the still pending

action of ejectment (Tr. p. 44) was brought against her by the appellant and others on that theory.

The appellant endeavors to make out that the sale was of a third interest and not of a ninth interest but of course he had at that time only a ninth interest and that was all that could be sold or could pass, whatever might have been purported to have been sold, as any one upon reading the will could see, and of course whatever interest the appellant actually had would pass under the sale irrespective of whether or not the sheriff represented that he had a greater interest or purported to sell a greater interest. McCandless v. Castle, 25 Haw. 22, 25. This is recognized also by Section 2461 of the Revised Laws, 1915, cited on p. 7 of appellant's brief. The sale and conveyance was effective to the extent of the defendant's interest and the sheriff was liable to the purchaser as to any excess that he purported to sell in case the purchaser should lose such excess. The representation at the sale or in the advertisement that the interest was a third interest, if any such representation was made, would operate in apellant's favor by tending to increase the amount bid.

In the second place, the appellant, before he made the alleged tenders, entered into an agreement (Tr. p. 29) to sell to Aluli, Lane and McCandless 6/9 of all the property, which agreement also purported to convey to said parties 6/9, and (Tr. p. 38) after making the alleged tenders, he executed a deed of the 6/9 to said persons by way of carrying out his prior agreement to do so. It is true that in his original bill he sought to set aside the conveyance of the 2/9 to Aluli and Lane and in

his amended bill he seeks to set aside the conveyance of the 4/9 to McCandless, as well as of the 2/9 of Aluli and Lane, but whether he can succeed in doing so or not we need not argue but will leave that to the argument on behalf of Aluli, Lane and McCandless. Assuming, however, that he can not have those conveyances set aside, it follows that he bound himself to convey and afterwards purported to convey 6/9 of the entire property, thus showing that he had no purpose whatever of carrying out the intention of the testator, which was that the whole property should go to the performing son or sons in the male line as a family scheme. After squandering his own means and losing his own original ninth he set out on a purely speculative proposition to get 3/9 and not all the property and, at the expense and through the efforts of other persons, to do his brothers and sisters or their assignees or heirs out of 6/9 for the benefit of strangers and that, too, to do them out of what he claims to be an immensely valuable property for merely $5,000 each. Certainly that is not strict, full and literal performance of the condition or indicative of a desire or effort to carry out the testator's expressed wish and certainly no court of equity would think of helping him out in such a scheme. He who comes into equity must do so with clean hands.

V. MULTIFARIOUSNESS, MISJOINDER, ADEQUACY OF REMEDY AT LAW, LACK OF PRIOR DETERMINATION OF QUESTIONS AT LAW, &c.

Many other objections, naturally suggested by the general frame of the bill, are raised by other paragraphs of this respondent's demurrer. We shall not deal with them at length or in detail in this brief,—partly because other counsel will deal with them more fully.

Was there ever such a conglomeration of matters not only equitable but both equitable and legal combined in a single bill? The case is practically a combination of actions at law in ejectment and for mesne profits against some of the parties and suits in equity for cancellation of various conveyances made at different times under different circumstances by and to different parties who have no relation to each other, for compelling conveyances from different unrelated parties, for partition, for removal of various alleged clouds, for quieting title and for various accountings from different persons who likewise have no connection with each other.

The appellant relies in part on the general proposition that when equity takes jurisdiction for one purpose it will retain it for the purpose of disposing of all matters in controversy and in part upon the general proposition that in an equity case all parties interested in the subject matter should be joined. He seems to contend that he has a right to clear up all questions in regard to this land in a single case and that since that cannot be done in an action at law it must be pos-

sible in a suit in equity. But equity will not allow even different equitable matters to be joined in the same suit unless there is some relation between them which will make it convenient and appropriate for hearing them together, and in general it will not decide legal matters unless they are merely incidental to the equitable matters which form the principal subject of the suit, as in Kawananakoa v. Puahi, 14 Haw. 72, 77, and Keauhulihia v. Puahiki, 4 Haw. 279, 282. If the equitable matters themselves are incidental to the legal matters, equity will not decide the legal also, but will leave the parties to their remedies at law, and especially will equity take care not to go so far in passing upon legal questions as to deprive respondents of their rights to trial by jury. And, of course, distinct and primary legal and equitable matters cannot be joined. Even within the appropriate limits it is largely discretionary with a court of equity to say how far it will go, and in general such a court will not allow different parties or different causes to be joined where the result would be to work undue hardship or inconvenience upon any of the parties, as, for instance, in the matter of expense or the time required for trial, as by compelling one respondent to go through a case when he may be interested only in a distinct part of it. See, in general, 21 Corp. Jur. 62, 140, 148, 408, et seq.; Scott v. Neely, 140 U. S. 106, 109-110; India Rubber Co. v. Cons. Rubber Co., 117 Fed. 354; Stout v. Phoenix Assurance Co., 65 N. J. Eq. 566 (56 Atl. 691); Freer v. Davis, 52 W. Va. 1 (43 S. E. 164); Charman v. Charman, 18 Haw. 415; Haw. Gov't v. Haw. Tram. Co., 7 Haw. 683.

In the present case, for instance, accountings are sought from Mrs. Lucas both as an adverse claimant of certain interests and as a holder of a mortgage and from the Scott children as adverse claimants of a distinct interest. In the original bill an accounting was sought also from the Kilauea Sugar Plantation Company as a lessee in possession under others holding adversely. In the amended bill the prayer for an accounting from the Sugar Company is omitted, but that Company is still a party to the bill and one of the objects of the bill is to obtain possession of the property and mesne profits. What possible reason is there for making Mrs. Lucas a party to an accounting from the Scott children as to an interest which Mrs. Lucas does not claim and has never had anything to do with, and conversely what possible reason is there for making the Scott children and their guardian parties to a suit for an accounting from Mrs. Lucas as to matters with which the Scott children and their guardian have no connection? See Carter v. Lane, 18 Haw. 10. And how can the apellant call for an accounting in equity from Mrs. Lucas or the Scotts, with neither of whom he is in privity and where the claims are legal and where no trust is involved and where there is no complication and where he may ask for possession and mesne profits in an action of ejectment?

Without, however, going into further particulars it may be stated that the appellees materially interested belong to two general groups, namely, Mrs. Lucas, the Scott children and the Sugar Company as adverse claimants of the legal title to the several interests in the

land and in possession, whom we may call the first group and from whom the appellant seeks to recover possession and mesne profits, and Aluli, Lane and McCandless, whom we may call the second group, with whom the appellant has a dispute under certain agreements made by him with them or deeds made by him to them. What possible connection is there between these two groups and the remedies sought against them respectively? The appellant and the second group joined as coplaintiffs in the pending action of ejectment against the first group on the theory that his deeds to them were good. Now he seeks to set aside those deeds so that he may recover the entire land himself. That is a matter solely between him and them. The first group is not interested in this controversy between him and the second group. They could not and would not be permitted to take part in that controversy. The case would have to be heard in regard to that before the questions in dispute between the appellant and the first group could be considered. That would probably involve a long trial. In the controversy between the appellant and the second group, no question as to the appellant's title or the titles of the members of the first group could be raised—just as the question of title could not be gone into in a suit in equity to cancel a deed for fraud. See Kapuakela v. Iaea, 9 Haw. 555, 556. The only question would be whether his conveyances to the second group should stand or be set aside and that would involve questions solely between the appellant and the second group—their agreements, their conduct, &c. What could be more absurd than to contend

that because a party may go into equity to cancel conveyances which he himself had made to A, B and C, he can also bring in D, E and F who are in possession under claim of title from an entirely different source and who have had nothing whatever to do with the conveyances from him to A, B and C? The matters involved between the appellant and each group should be made the subject of separate suits not only because they are distinct from each other but also because one is of an equitable nature and the other of a legal nature and because the parties concerned have no connection with each other. Indeed, even if the parties were the same, equity should confine itself to the equitable question and leave the parties to an action at law as to the legal questions, as in the case just cited. See also Kaaimanu v. Kauwa, 3 Haw. 610. If appellant's view is sound, then all one has to do in order to avoid a trial at law and get into equity is to make a deed to some friend and then bring a suit in equity to set it aside and drag into the case all disputes with other unrelated parties as to the legal title.

Assuming that the appellant may pursue an equitable remedy against Aluli, Lane and McCandless for cancellation of his conveyance to them and also an equitable remedy against Mrs. Lucas for cancellation of the execution sale and conveyance to her, it does not follow that he may combine even these equitable remedies in one proceeding. These are distinct remedies against different parties for different relief and involving entirely different evidence. How much less could he combine a suit in equity against Aluli, Lane and

McCandless for undoing a transaction solely between him and them on the ground of fraud, &c., with an action at law, which it really amounts to, against Mrs. Lucas, the Scott children and the Sugar Company for the recovery of possession and mesne profits on the ground that he has the legal title under the terms of a will and by virtue of his performance of conditions prescribed by the will.

The appellant seems to contend that because all these questions or remedies have to directly or indirectly with the same land he can combine them all—on the theory that the land is the subject matter of the suit and that all persons interested in the subject matter of an equity suit should be made parties. See his brief, p. 18. As well, or indeed much better, might he contend that in Carter v. Lane, 18 Haw. 10, cited above, the appellant could call for accountings from two sets of trustees because both sets were acting under the same will—which was a much simpler case than the present. As well might he say that because the remedies all relate to the same land he might combine suits against A for an injunction to prevent interference with an appurtenant water right, against B for an injunction to prevent interference with an appurtenant right of way, against C for an injunction against trespassing on an appurtenant fishing right, against D to remove a cloud, against E for an accounting under a mortgage, against F for rents under a lease, against G for specific performance of a contract to convey or quitclaim some asserted interest in the land, against H for damages for trespass on the land, against I for pos-

session of part of the land, against J for damages for previous occupancy without right, against K for quieting the title, against L for the cancellation of a deed obtained by fraud, against M for partition, and so on through the other half of the alphabet.

The appellant's obvious course is to bring a suit or suits in equity against Aluli, Lane and McCandless for the cancellation of his conveyances to them; another suit in equity against Mrs. Lucas to undo the execution sale and conveyance to her (unless that sale and conveyance is void for want of service of process, in which case it may be disregarded in an action at law); and lastly an action or actions at law in ejectment and for mesne profits against Mrs. Lucas, the Scott children and the Sugar Company.

This of course would not be a case of multiplicity of suits to avoid which equity would or could take jurisdiction. Not the semblance of an argument can be made in support of jurisdiction on that ground either under the facts or from the nature of the questions involved in this case. The circumstances under which equity may take jurisdiction in order to avoid a multiplicity of suits are well defined in the books and do not include anything of the sort here presented.

Various other questions involved under this general heading have been passed on by the Supreme Court of Hawaii. For instance, appellant seeks partition in case it should be held that he is still entitled to a one-ninth interest but not to the other interests in the land, and yet it is well established that a partition suit will not lie until the title has first been established at law when

there is a dispute as to title. Moranho v. De Aguiar, 25 Haw. 271, 273, citing Brown v. Davis, 21 Haw. 327, 329, Kaneohe Rice Mill v. Holi, 20 Haw. 609, and Wailehua v. Lio, 5 Haw. 519.

Again, the appellant seeks to quiet title by removing clouds, etc., and yet it is well established that a person out of possession can not maintain such a bill where there is a dispute as to title until his right or title has been adjudicated at law. See Kuala v. Kuapahi, 15 Haw. 300.

Appellant endeavors to make out that he is entitled to come into equity for the purpose of establishing his title as against the first group on the authority of Sharon v. Tucker, 144 U. S. 533. The idea is that this would not be a suit in the nature of a bill of peace or of quia timet but a bill to supply a record of title analogous to a bill for restoring a lost record or supplying the want of a lost deed. But, even if he could maintain a suit against the first group on this theory, that would be no reason for combining such a suit with a suit against the second group for the cancellation of conveyances, as these are distinct matters involving distinct parties. But of course Sharon v. Tucker is not applicable to the present case. Incidentally the present bill was not brought on that theory. No doubt that case was found afterwards and the theory was a second thought. But even if the bill had been brought on that theory, the case relied upon would not support it, for in the present case the title is most emphatically in dispute and not only on questions of law but also on questions of fact while in the Sharon case there was no dispute at all

as to the title. As the court said, on page 543: "The title of the complainants is not controverted by the defendants," and, on page 544, "As the complainants have the legal right to the premises in controversy, and as no parties deriving title from the former owners can contest that title with them there does not seem to be any just reason why the relief prayed should not be granted," and, on page 548, "No existing rights of the defendants will be impaired by granting what is prayed, and the rights of the complainants will be placed in a condition to be available. The same principle which leads a court of equity upon proper proof to establish by its decree the existence of a lost deed, and thus make it a matter of record, must justify it upon like proof to declare by its decree the validity of a title resting in the recollection of witnesses, and thus make the evidence of the title a matter of record." If that case is authority in support of an equity suit against the first group then it is authority for any one, whether in or out of possession, who claims a title of which he has no record, as, for instance, by adverse possession, to sue in equity instead of at law and thus deprive the defendant of his right of trial by jury by claiming that what he wishes is to get some record made as to his title.

On most of the points covered in this portion of this brief and related points, the appellant cites numerous cases in support of general propositions but without undertaking to show that the facts are analogous to those in the present case. A few cases negativing the propriety of assuming jurisdiction in cases analogous to

this are far more relevant than any number of general statements made with reference to radically different situations. And we really do not need to go beyond the established law in Hawaii to show the absurdity of sustaining the bill in this case upon the demurrers of this respondent and Mrs. Lucas and the Scotts.

Dated at Honolulu, T. H., April 20, 1925.

Respectfully submitted,

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